Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:3:TL-N-2529-01
RLPeacock

date:

to: Richard Fleming, Territory Manager
Large and Mid-Size Business Division (Communications, Technology & Media)
Attn: Anne Lau, Revenue Agent

from: Area Counsel (Financial Services & Healthcare)(Area 1: Manhattan)

subject: [redacted]

STATUTES OF LIMITATION EXPIRE: [redacted]

UIL Nos. 6501.08-00 and 6501.08-17

INTRODUCTION

This memorandum responds to your request for assistance dated April 13, 2001. This memorandum should not be cited as precedent. Specifically, you have asked our office to provide you with the appropriate language to use on a Form 872 (Consent to Extend the Time to Assess Tax)("Form 872") with respect to [redacted] for the taxable years ending [redacted] and [redacted].

ISSUES

1. Which entity is the proper entity to execute a Form 872 for [redacted] for the taxable years ending [redacted] and [redacted]?

2. What specific language should be used on the Form 872 for [redacted] for the taxable years ending [redacted] and [redacted]?

BACKGROUND

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for

review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately 10 days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

[redacted] (EIN [redacted]) is a Georgia corporation. As of [redacted], [redacted] owned and operated [redacted]. For the taxable years ending [redacted] and [redacted], [redacted] filed a Form 1120 U.S. Corporation Income Tax Return ("Form 1120") with its subsidiaries. The LMSB Manhattan examiners are currently conducting an examination of [redacted]'s income tax liability for the taxable years [redacted] and [redacted].

In [redacted], [redacted] merged with [redacted] ("merger one"). Our office does not have a copy of the merger agreement from merger one. Instead, the revenue agent has provided us with two pages from [redacted]'s Form 10-K, which was filed with the Securities and Exchange Commission. According to the Form 10-K, on [redacted] [redacted] entered into an Amended and Restated Agreement and Plan of Merger ("merger agreement one") with [redacted], a Delaware corporation and a wholly-owned subsidiary of [redacted] ("New [redacted]"), [redacted], a Delaware corporation ("Delaware Sub") and [redacted], a Georgia Corporation ("Georgia Sub"). Merger agreement one provided that: 1) Georgia Sub would merge into [redacted]; 2) each share of [redacted]'s outstanding common stock would be converted into [redacted] of a share of common stock of New [redacted]; 3) each share of [redacted]'s outstanding preferred stock would be converted into [redacted] shares of New [redacted] common stock; 4) Delaware Sub would merge into [redacted]; 5) each share of [redacted]'s outstanding common stock would be converted into one share of New [redacted] common stock; 6) each share of [redacted]'s outstanding preferred stock would be converted into one share of New [redacted] preferred stock; 7) [redacted] and [redacted] would become wholly-owned subsidiaries of New [redacted]; and 8) New [redacted] would change its name to "[redacted]" ("[redacted]"). As a result of merger one, [redacted] acquired the [redacted]% interest in [redacted] which it did not previously own. [redacted], while continuing to exist, became a subsidiary of [redacted]. This merger was completed on [redacted].

On [redacted], after the effective date of merger one [redacted] executed a Form 872 captioned "[redacted] (EIN [redacted]) as successor in interest by way of merger with [redacted] (EIN

[redacted])" for the taxable years [redacted] and [redacted]. While there may be additional Forms 872 which were executed after the effective date of merger one, our office does not have copies of these Forms 872. The Form 872 was signed by [redacted], the Vice President of Taxes for [redacted]. The examination division signed the Form 872 on [redacted]. The current statute of limitations for [redacted]'s [redacted] and [redacted] taxable years expires on [redacted].

In late [redacted] or early [redacted], [redacted] and [redacted] ("[redacted]") created a holding company known as [redacted]. [redacted] and [redacted] were each [redacted]% shareholders of [redacted]. [redacted] was the parent company of two wholly-owned subsidiaries: [redacted] Merger Sub, Inc. ("[redacted] Merger Sub"), a Delaware Corporation, and [redacted] Merger Sub, Inc. ("[redacted] Merger Sub"), a Delaware Corporation. On [redacted], [redacted], [redacted], [redacted], [redacted] Merger Sub and [redacted] Merger Sub entered into an Agreement and Plan of Merger ("merger agreement two").

The merger agreement provided as follows:

> 2.1 The Mergers. Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the Delaware General Corporation Law ...
>
> > (a) [redacted] Merger Sub shall be merged with and into [redacted] (the "[redacted] Merger"). [redacted] shall be the surviving corporation in the [redacted] Merger and shall continue its corporate existence under the laws of the State of Delaware. As a result of the [redacted] Merger, [redacted] shall become a wholly owned subsidiary of [redacted].
> >
> > (b) [redacted] Merger Sub shall be merged with and into [redacted] (the "[redacted] Merger"). [redacted] shall be the surviving corporation in the [redacted] Merger and shall continue its corporate existence under the laws of the State of Delaware. As a result of the [redacted] Merger, [redacted] shall become a wholly owned subsidiary of [redacted].

The merger agreement also provided that, as a result of the merger, holders of shares of [redacted] common stock would each receive [redacted] share of [redacted] stock. The holders of shares of [redacted] common stock, Series [redacted] stock and Series [redacted] common stock would each receive [redacted] shares of [redacted] common stock, [redacted] common stock and [redacted] common stock, respectively. The holders of shares of [redacted] Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock and Series [redacted] preferred stock received one share of [redacted] Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock and Series [redacted] preferred stock, respectively.

As a result of the [redacted] merger ("merger two"), [redacted] and [redacted] became the wholly-owned subsidiaries of [redacted]. [redacted]'s shareholders owned approximately [redacted]% of [redacted]; [redacted]'s shareholders owned approximately [redacted]% of [redacted]. In addition, [redacted] Merger Sub and [redacted] Merger Sub, which were created solely for the purpose of acquiring [redacted] and [redacted], respectively, were merged out of existence. The merger was completed on [redacted].

The revenue agent has indicated that [redacted] remained in existence after merger two.

At issue is the proper entity who may sign a Form 872 for [redacted]'s [redacted] and [redacted] consolidated income tax liabilities. Also at issue is the proper language to use on the Form 872.

DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the extension, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed extension to the taxpayer. The AIMS/Processing Handbook (IRM 104.3) provides the procedures for processing consents to extend the statute of limitations on assessment. IRM 104.3.30.11.3 discusses the preparation of Form 895 and Form 5348 when a consent to extend the statute is received by the Service. Please note that dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. This includes Form 5348. In the event an extension becomes separated

from the file or lost, these other documents would become invaluable to establish the agreement.

We further note that according to section 3461(b)(2) of the Restructuring and Reform Act of 1998 (codified at I.R.C. § 6501(c)(4)(B)), you must advise the taxpayer of its right to refuse to extend the statute of limitations or, alternatively, to limit an extension to particular issues or specific periods of time. We suggest using Publication 1035 when soliciting the Form 872 to satisfy this requirement, or advising the taxpayer orally or by other writing. In any event, please be sure to document your actions in the case file.

1. Which entity is the proper entity to execute a Form 872 on behalf of [redacted] for the taxable years [redacted] and [redacted]?

The first issue is which entity is the proper entity to execute a Form 872 for [redacted] after mergers one and two for the pre-merger tax years.

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent for corporations.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment for income tax can be found in the consolidated return regulations. See Treas. Reg. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c)(1).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether

consolidated returns are filed in subsequent years, whether one or more subsidiaries have become or have ceased to be members of the group, whether the common parent ceases to be the common parent or a member of the group in any subsequent year, and whether the group continues pursuant to Treas. Reg. § 1.1502-75(d). See Treas. Reg. § 1.1502-77(a). See also, Prop. Reg. § 1.1502-77(a)(4) (September 26, 2000). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

Here, [redacted] has remained in existence after both mergers one and two. Under the current regulations and the proposed regulations, it is, therefore, the appropriate party to execute the Form 872 on its own behalf for [redacted] and [redacted].

Note, however, that there may be an alternative agent authorized under Treas. Reg. §1.1502-77T who can execute the Forms 872 on behalf of [redacted]/. Treas. Reg. § 1.1502-77T provides alternative agents for the purpose of extending the statute when the common parent of a group ceases to be a common parent, whether or not the common parent remains in existence. Under this provision, a waiver obtained from any one of several alternative agents is deemed to be given by the agent of the group. See Treas. Reg. §1.1502-77T(a)(3). Treas. Reg. § 1.1502-77T(a)(4) sets forth the following alternative agents:

> (i) The common parent of the group for all or any part of the year to which the notice or waiver applies;
>
> (ii) A successor to the former common parent in a transaction to which section 381(a) applies;
>
> (iii) The agent designated by the group under Treas. Reg. §1.1502-77(d);
>
> (iv) If the group remains in existence after a reverse acquisition or downstream transfer, the common parent of the group at the time the waiver is given or the notice mailed.

[redacted] was the common parent for the group during the years at issue. As such, it may execute a waiver pursuant to subparagraph (i). After merger one, [redacted] was an

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[1]/ The Service published proposed regulations on September 26, 2000 which terminate the application of Treas. Reg. § 1.1502-77T. See Prop. Reg. § 1.1502-77(a). The proposed regulations are not yet effective. See Prop. Reg. § 1.1502-77(h).

alternative agent for [redacted] for [redacted] and [redacted]. After merger two, [redacted], as the "successor to the successor," became an alternative agent for [redacted] for [redacted] and [redacted], pursuant to Treas. Reg. § 1.1502-77T(4)(ii). Subparagraph (a)(4)(iii) does not apply because no agent appears to have been designated by the group. Subparagraph (a)(4)(iv) does not apply because it does not appear that there was a reverse acquisition or downstream transfer in either merger one or merger two.

Treas. Reg. § 1.1502-77T(4)(ii) provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381 applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraphs A, C, D, F or G of section 368(a)(1). If the subject merger is a tax-free reorganization within the meaning of sections 361 and 368(a)(1), then section 381 will apply to the merger.

To qualify as a tax-free reorganization under section 368(a)(1), the following requirements must be met: First, the transaction must be structured as a Type A, C, D, F, or G reorganization. I.R.C. § 368(a)(1). Second, there must be continuity of proprietary interest. Treas. Reg. § 1.368-1(b). Third, the restructuring must have been pursuant to a plan of reorganization. I.R.C. §§ 354 and 361. Fourth, there must be a business purpose for the reorganization. Treas. Reg. §1.368-1(c). Finally, there must be continuity of business enterprise. Treas. Reg. § 1.368-1(d). In the subject case, it appears that the above requirements have been met by both mergers.

First, Merger one is a Type A reorganization because it is the merger of Georgia Sub into [redacted] and the merger of Delaware Sub into [redacted], with [redacted] and [redacted] emerging as the surviving corporations, pursuant to the corporation laws of the state of Delaware. See Treas. Reg. § 1.368-2(b)(1). New [redacted] retained a sufficient proprietary interest in [redacted] because it exchanged its stock for the stock of [redacted]. See Treas. Reg. § 1.368-1(e)(1). The restructuring was pursuant to a plan of reorganization as evidenced by merger agreement one. The business purpose of the reorganization is evident because there appears to be no purpose for the merger, other than a business purpose. Finally, there is continuity of business enterprise since there has been no indication that New [redacted] would discontinue [redacted]'s previous business activities. See 12 U.S.C. § 214b.

Second, merger two is a Type A reorganization because it is the merger of [redacted] Sub into [redacted] with [redacted]

emerging as the surviving corporation, and the merger of [redacted] Sub into [redacted] with [redacted] emerging as the surviving corporation, resulting in [redacted]'s ownership of both [redacted] and [redacted], pursuant to the corporation laws of the State of Delaware. See Treas. Reg. § 1.368-2(b)(1). [redacted] retained a sufficient proprietary interest in [redacted] because it exchanged its stock for the stock of [redacted]. See Treas. Reg. § 1.368-1(e)(1). The restructuring was pursuant to a plan of reorganization as evidenced by merger agreement two. The business purpose of the reorganization is evident because there appears to be no purpose for the merger, other than a business purpose. Finally, there is continuity of business enterprise since there has been no indication that [redacted] would discontinue [redacted]'s previous business activities. See 12 U.S.C. § 214b.

In view of the foregoing, merger one and merger two both appear to be reorganizations within the meaning of section 368(a)(1)(A). Therefore, [redacted] (after merger one) and [redacted] (after merger two) would be the successors to [redacted] in a transaction to which section 381 applies. [redacted] (after merger one) and [redacted] (after merger two) would then be alternative agents for purposes of entering into an agreement to extend the statute of limitations on assessment for the [redacted] consolidated group for the tax years at issue, pursuant to Treas. Reg. §1.1502-77T(a)(4)(ii).

Here, your office has previously obtained a signed Form 872 from [redacted] with respect to the income tax liability of [redacted] for the taxable years [redacted] and [redacted]. [redacted] executed a Form 872 after merger one on behalf of [redacted] as the "successor in interest by way of merger," in accordance with Treas. Reg. §1.1502-77T. Although [redacted] and [redacted] would be appropriate alternative agents to sign the Forms 872 on behalf of [redacted], the proposed regulations eliminate the alternative agent rules in an effort to provide certainty as to who may execute Forms 872 on behalf of consolidated groups. We therefore recommend that, in the future, your office obtain Forms 872 executed by [redacted] consistent with the guidelines set forth in Treas. Reg. § 1.1502-77(a) and Prop. Reg. § 1.1502-77(a)(9/26/00). Although the proposed regulations are not yet in effect, they reflect the preferred thinking of the Service.

Note, also, that the regulations under section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul.

84-165, 1984-2 C.B. 305. In the case of a corporate return, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Here, an officer of [redacted] should sign any future Forms 872.

2. What specific language should be used on the Form 872?

The second issue is what language should be used on the Form 872 for [redacted].

The caption on the Form 872 extending the statute of limitations for [redacted]'s [redacted] and [redacted] income tax liabilities should read, "[redacted] (EIN [redacted]) [redacted]."

The following language should also be inserted on the Form 872 for [redacted] if [redacted] is a partner in any partnerships and if the statute on partnership item adjustments is still open:

> Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b) but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1), above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

Should you have any questions regarding this matter, please contact Robin L. Peacock at (212) 264-1595, extension 246.

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disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
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By: _____
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